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IN THE COURT OF APPEALS (FIRST CIRCUIT) OF THE STATE OF LOUISIANA

LOUIS WILBURN McDOWELL

versus

NATIONAL SURETY CORPORATION

STATEMENT AS TO JURISDICTION

Statement of the Case

Appellant is the National Surety Corporation, organized under the laws of the State of New York, domiciled in the City of New York, authorized to do and doing business in the State of Louisiana and the Parish of East Baton Rouge. The instant case was instituted in the Nineteenth Judicial District Court of the State of Louisiana, within and for the Parish of East Baton Rouge, Louis Wilburn McDowell against the above said National Surety Corporation, for damages for personal injury arising out of an automobile accident allegedly resulting from the negligence of the driver, namely Cora Maxine McDowell, wife of Louis Wilburn McDowell, who was at the time driving the automobile owned by the said Louis Wilburn McDowell, who was also riding in said car. Defendant, National Surety Corporation, filed exceptions of no cause or right of action, which the District Court overruled, and the defendant thereupon filed an answer, reurging the exceptions of no cause or right of action, and denying any liability in part upon the allegations that Sections 655 and 983, Title 22 of Louisiana Revised Statutes of 1950.

as amended, were unconstitutional under the particular facts of this case and under the United States Constitution and its amendments, in that they impaired the obligation of defendant's contract with plaintiff; that they deprived defendant of its rights and property without due process of law; and that they denied defendant equal protection of the laws. The District Court rendered judgment against the defendant and in favor of the plaintiff, which decision was appealed by the defendant to the Court of Appeal (First Circuit) for the State of Louisiana. In said appeal, your appellant reurged among others the repugnancy of Sections 655 and 983, Title 22 of Louisiana Revised Statutes of 1950, as amended, to the United States Constitution and the amendments thereto. The Court of Appeals (First Circuit) of the State of Louisiana, affirmed the District Court's decision, wherein His Honor, Judge Ellis, dissented with written reasons. Timely application was then had by your appellant to the Court of Appeals (First Circuit) of the State of Louisiana for rehearing, which was denied. Your appellant herein again reurged the unconstitutionality of the above said Louisiana Statute. Your appellant thereupon made timely application to the Supreme Court of the State of Louisiana for writs of certiorari and review directed to the Court of Appeals (First Circuit) of the State of Louisiana, continuing to urge among others, the above said unconstitutionality of the said Louisiana Statute. Your appellant's application for writs of certiorari or review were refused by the Supreme Court of the State of Louisiana, on February 15, 1954.

Opinions Below

The opinion of the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Honorable Charles A. Holcombe, Judge, is attached hereto as appendix 1. The majority opinion and the dissent thereto

of the Court of Appeals (First Circuit) of the State of Louisiana is attached hereto as appendix 2.

The opinion of the Court of Appeals (First Circuit) of the State of Louisiana, denying rehearing is attached hereto as appendix 3.

The opinion of the Supreme Court of the State of Louisiana denying application for certiorari or writ of review to the Court of Appeals (First Circuit) of the State of Louisiana is attached hereto as appendix 4.

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257 (2) of Title 28 of the United States Code, or in the alternative, Section 1256 (3) of Title 28 of the United States Code.

Statute of the State Involved

The statute of the State, the validity of which is involved, is the so-called direct action statute of the State of Louisiana, more particularly described as Louisiana Revised Statutes of 1950, Title 22, Sections 655 and 983, as amended. A certified copy of these two sections of the said statute are attached hereto as appendix 5.

Date of Judgment and of Application for Appeal

The opinion and judgment of the Court of Appeals (First Circuit) of the State of Louisiana was rendered on October 6, 1953, (Appendix 2 hereto). The petition for rehearing to the Court of Appeals (First Circuit) of the State of Louisiana was denied on December 8, 1953, (Appendix 3 hereto). The application for writs of certiorari or review were denied by the Supreme Court of the State of Louisiana on February 15, 1954, (Appendix 4 hereto). The application for appeal was presented April 15, 1954.

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

American Railway Express Co. v. *Levee,* 263 U. S. 19 (1923);
Minneapolis, St. P. S. M. Ry. Company v. *Rock* (1929), 279 U. S. 410, 49 S. Ct. 363, 73 L. Ed. 766;
Prudential Insurance Company of America v. *Cheek* (1922), 259 U. S. 530, 42 S. Ct. 516, 66 L. Ed. 1044, 27 A. L. R. 27;
Lovell v. *City of Griffin,* 303 U. S. 444, 58 S. Ct. 666;
Abie State Bank v. *Weaver,* 282 U. S. 765, 51 S. Ct. 252;
State of New York ex rel. Bryant v. *Zimmerman,* 278 U. S. 63;
Winters v. *People of the State of New York 3,* 333 U. S. 507, 68 S. Ct. 655.

Raising the Federal Questions

In paragraph 34 of your appellant's answer to the original petition herein, Sections 655 and 983 of Title 22, Louisiana Revised Statutes of 1950, as amended, was quoted and attack thereupon was made as follows: "1. Said statutes violate the United States Constitution under the particular facts of this case in that: (a) They impair the obligation of defendant's contract with plaintiff, (b) They deprive defendant of its property and rights without due process of law, and (c) They denied to defendant the equal protection of the laws." With regard to this attack based upon the unconstitutionality of the statute, the Nineteenth Judicial District Court of the State of Louisiana held:

> "These observations, I think, disposes of all of the questions presented, except the alleged unconstitutionality of Sections 655 and 983, Title 22, L. R. S., which I find to be without merit.
>
> The validity and constitutionality of such statutes have been upheld in various decisions in both State and

Federal Courts. See Bouis v. Aetna Cas. & Surety Co., 91 F. Supp. 954; Hudson v. Georgia Cas. Co., 57 F. (2) 757; Parker v. Home Ind. Co., 41 So. (2) 783; Burglass v. Burglass, 193 So. 275."

In its original brief submitted upon appeal to the Court of Appeals (First Circuit) of the State of Louisiana, appellant specifically renewed its attack upon the validity of the above said statute as being in contravention of the United States Constitution, Article 1, Section 10, and the Fourteenth Amendment thereto. Paragraph 3 of this appeal brief reads as follows:

"§. Both Section 655, Louisiana Revised Statutes of 1940, as amended, and the judgment rendered herein by the Honorable Lower Court are in clear violation and contravention of the United States Constitution, Article 1, Section 10, and the fourteenth amendment thereto."

In its decision upon appeal, the Court of Appeals (First Circuit) of the State of Louisiana, said with regard to the question of constitutionality:

"The said statute has been held constitutional. Churchman v. Ingram, 56 So. Second 297, 307."

In its application for rehearing to the Court of Appeals (First Circuit) of the State of Louisiana, your petitioner continued steadfastly to urge the unconstitutionality of the direct action statute in question. We quote in part from Section B of said application:

"B. *This Court is in Legal Error in holding that Section 655, Title 22 of the revised statutes is constitutional when applied to the facts of this case in that it:*

1. *Deprives defendant of its property without due process of law, and discriminates between a non-resident insurer and a resident insured.*

2. *It impairs the obligation of defendant's contract with plaintiff.*

. . . When any insurance company, foreign or domestic undertakes to do business in this state, it of course expects to abide by the applicable laws of the state, including the direct action statute in exchange for the privilege of doing business in this state, but it cannot be expected to sit idly by and have its contract rendered completely asunder under the guise of constitutional enforcement. . . .

The defendant in this action is a foreign corporation authorized to do and doing business in this state. Even as such, it cannot be doubted that it has individual rights before the law the same as any private individual citizen of this state. When such an insurance company contracts, with regard to a policy of automobile liability insurance, with the named assured, it agrees to stand in the place of the named assured, or the named assured's additional assured which arises from a relationship of family or agency from the named assured, up to a certain amount of liability arising from the operation of the vehicle named in the policy. In other words, two individuals, legally speaking, make a conditional contract whereby one will stand in the other's stead should the agreed condition arise. As such we assert and vigorously maintain that the treatment afforded to either of the two contracting parties cannot be substantially different, without contravening the Fourteenth Amendment to the United States Constitution, the right to "due process." Our courts cannot say yes to the insured and no to the insurer on the same identical issue.

In the case of Caldwell v. State of Texas, 137 U. S. 692, Mr. Chief Justice Fuller, speaking for the court, said:

> "And due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private

> right and distributive justice." Bank v. Okley, 4 Wheat. 235, 244. The power of the state must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary. Hurtado v. California, 110 U. S. 516, 535, 4 Sup. Ct. Rep. 111, 292."

The United States Supreme Court was there dealing with a criminal matter, but the test laid down, as above quoted, cannot but have civil application as well under a state's governmental actions, i.e. judicial, are squarely in the teeth of it. (See also Know v. State, 68 Tenn. 202; Miller v. City, 44 So. 388; Nebbia v. People of State of New York, 54 S. Ct. 505; People v. Coleman, 79 P. 283.)

• • • • • • •

This court is in legal error in holding that Louisiana Revised Statutes, Title 22, Section 655, for the year 1950, as amended, is constitutional and contemplates an action of the nature as is herein alleged.

The majority opinion in relation to this presents the following:

> "Suppose, for instance that an injured party chose, instead of suing the insurer, to sue the insured party and was awarded judgment. There would be no question then that the insured party could sue his insurer for the amount collected by the injured party."

Such a supposition as is here presented could not take place in the instant case, since the supposition would involve the suit of a husband against himself, or even under this court's broad interpretation, a suit by a husband against his wife. It will be immediately assumed that we are discussing here only the question of coverture, but it involves more since our fundamental law of community property is likewise involved. As we understand it, the direct action statute was a procedural means of preventing duplicity of suits. If

such is true, we earnestly maintain that such a statute cannot be used as a bridge to cross the gap where there is no possibility of a first suit, i.e. in this case, one by the husband against his wife. (C. P. 118)

To hold that the direct action statute is applicable to the facts in the present suit is to give it an unjust and harsh interpretation and application which produces unreasonable and unwise effects. On the basis of our remarks contained in the preceding section, it will be seen that under the majority's interpretation, and application, a husband who is the named assured is being allowed to bypass an impossible suit against himself or against his own wife in order to bring a direct action against one who has contracted with him to stand in his stead with regard to his liability growing from the negligent operation of his own car.

We feel that such an interpretation and application is harsh, unjust and unreasonable, and as such prohibited by our law. (Haughton v. Hall, 148 So. 37; State ex rel Womack v. Jones, 10 So. 2d 213; Berteau v. Police Jury of Parish of Ascension, 39 So. 2d 594; Webb v. Parish Council of Parish of East Baton Rouge, 47 So. 2d 718; State v. Standard Oil Co. of Louisiana, 178 So. 601; State v. Petty, 20 So. 2d 546; Department of Highways v. Lykes Bros. S.S. Co., 24 So. 2d 263.) . . . "

Your appellant again reurged the unconstitutionality of the statute in Paragraph B of its application to the Supreme Court of the State of Louisiana for writs of certiorari or review. The language therein closely paralleled that of the above said application for rehearing and we allude to it here by reference. The Supreme Court of the State of Louisiana did not assign written reasons for its refusal to grant your petitioner's application for certiorari or writ of review, but merely stated "Writ refused. The judgment is correct."

Statement of the Grounds upon Which It Is Contended the Questions Involved Are Substantial

1. The issues involved in the instant case directly concern themselves with considerable and substantial property rights and interest of your appellant herein. In addition there are involved here questions and considerations which have profound and far-reaching effect upon the law of the State of Louisiana, the property of the insurance companies doing business in the State of Louisiana, and the contracts of the said insurance companies. The State statute in question, as interpreted by the Courts of the State of Louisiana, forces your appellant to defend a suit against its property with only a portion of those means generally and usually allowed to others in like circumstances. The State statute, as interpreted by the Courts of the State of Louisiana, is therefore invalid and deprives appellant of its property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution.

Quaker City Cab Company v. *Commonwealth of Pennsylvania*, 277 U. S. 389, 48 S. Ct. 553 (1928);

State of Missouri v. *Public Service Commission* (1923), 262 U. S. 276, 43 S. Ct. 544;

Truax, et al. v. *Corrigan, et al.* (1921), 257 U. S. 312, 42 S. Ct. 124;

Minneapolis and St. L. Ry. Company v. *Deckwith* (1889), 129 U. S. 26, 9 S. Ct. 207;

Hayes v. *State of Missouri* (1887), 120 U. S. 68, 7 S. Ct. 350;

Yick Wo v. *Hopkins* (1886), 118 U. S. 356, 6 S. Ct. 1064;

Pavel et al v. *Pattison* (W. D. La. 1938), 24 F. Supp. 915;

Joseph Triner Corp. v. *Arundel et al.* and *Frank McCormick, Inc.* v. *Same* (W. D. La. 1935), 11 F. Supp. 145;

Northwestern Nat. Ins. Company of Milwaukee, Wis. v. *Lee* (District Court, D. Oregon 1931) 49 F. 2d 274.

We submit that there can only be due process of law, when all persons are allowed the reasonable and usual use of the laws, both substantive and procedural, found in the jurisdiction in which they reside or seek to invoke the aid of a court of justice. The decisions of both the District Court and the Majority of the Court of Appeals (First Circuit) of the State of Louisiana, denied to your appellant his basic right to invoke the defense of community mission, imputed negligence, prohibition against community enrichment, and that against allowing suits by a husband against his wife, except in certain specific circumstances, this being not one of such circumstances. All of this is done under the purported sanction of the Louisiana Statute providing for a right of direct action against the insurer, and all of it is done directly in the teeth of the intent Section of the said Statute, which we quote as follows:

> ". . . It is the intent of this section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of the State."

2. The State statute here involved as looked upon by the decision of the Court of Appeals (First Circuit) of the State of Louisiana, and that of the other Courts of the State of Louisiana, in holding your appellant, the insurer, liable for injuries resulting to the named assured, arising from the operation of the named insured's automobile, then being driven by his wife, but in which the named assured was at that time riding, is invalid in that it impairs the obligation of your appellant's contract with the named

assured, in contravention of the United States Constitution, Article 1, Section 10.

Bayard v. *Traders & General Ins. Co., et al.*, 99 F. Supp. 343 (W. D. La. 1951);
Planters Bank v. *Sharp*, 6 How. 327, 12 L. Ed. 447;
Home Ins. Co., et al. v. *Dick et al.*, 281 U. S. 397, 50 S. Ct. 338 (1930);
Bank of Minden, et al. v. *Clement*, 256 U. S. 126, 41 S. Ct. 408 (1921);
Ogden v. *Saunders*, 12 Wheat. 213, 6 L. Ed. 606;
People ex rel. Kerner, Atty. Gen. v. *Railway Mut. Benefit Assn.*, 371 Ill. 102, 20 N.E. 2d 91 (1939);
Tremper v. *Northwestern Mut. Life Ins. Co.*, 119 P. 2d 707 (1941).

For many years prior to 1930, the year in which the Louisiana Direct Action Statute was adopted by the State's Legislature, your appellant and other insurance companies were writing liability policies of the same nature as that which is now under consideration in the instant case. The contractual obligations, rights, and duties, between the parties were well set out and known by all the parties thereto. The lines of contractual relationship were well delineated. We have been unable to find any cases and we know that all parties here concerned will admit that prior to the passage of the original direct action statute in the State of Louisiana, the type of action here being considered would have been impossible. The highest courts of our State in some decisions have held that the so-called direct action statute is procedural only, whereas others have held that it is likewise substantive. However, whether it be held procedural or substantive, in the instant case, its application in allowing the named assured to sue his insurer under the facts herein, adds to the contract of insurance which governs the rela-

tionships, rights and duties of the parties and goes above and beyond what has been universally held and understood to constitute a policy of liability insurance. The portion of the contract or policy of insurance with which we are here concerned is Coverage A—Bodily Injury Liability. Your appellant agreed to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury resulting to any person from the use or operation of the automobile which is insured in the policy. The so-called direct action statute of the State of Louisiana is used as a lever to force your appellant to pay for injuries arising out of the use of the insured automobile under circumstances in which there is not or ever could be any legal obligation for the assured, named or included in the omnibus clause, to pay to the injured party.

3. The decision of the Court of Appeals (First Circuit) of the State of Louisiana and that of the other courts thereof, in holding that the insurer must stand in damages under circumstances in which neither the named assured nor the additional assured under the omnibus clause could be held, thereby discriminating between a resident insured and a non-resident insurer, denies to your appellant the equal protection of the laws, and is therefore in conflict with the Fourteenth Amendment to the United States Constitution.

Quaker City Cab Company v. *Commonwealth Pennsylvania*, 277 U. S. 389, 48 S. Ct. 553 (1928);

State of Missouri v. *Public Service Commission* (1923) 262 U. S. 276, 43 S. Ct. 544;

Truax et al. v. *Corrigan et al.*, (1921) 257 U. S. 312, 42 S. Ct. 124;

Minneapolis and St. L. Ry. Company v. *Deckwith*, (1889) 129 U. S. 26, 9 S. Ct. 207;

Hayes v. *State of Missouri* (1887) 120 U. S. 68, 7 S. Ct. 350;

Yick Wo v. *Hopkins* (1886) 118 U. S. 356, 6 S. Ct. 1064;
Pavel et al. v. *Pattison* (W. D. La. 1938) 24 F. Supp. 915;
Joseph Triner Corp. v. *Arundel et al.* and *Frank McCormick, Inc.* v. *Same* (W. D. La. 1935) 11 F. Supp. 145;
Northwestern Nat. Ins. Company of Milwaukee, Wis., v. *Lee* (District Court, D. Oregon 1931) 49 F. 2d 274.

The parties involved herein are a non-resident insurer, a resident insured, and an additional assured who is also a resident. In Paragraph 2 above, we pointed out that the insurer agrees to pay on behalf of the insured a certain limited sum as damages for bodily injury to any person arising from the use of the automobile named in the insurance policy. The insurer thus contracts to pay if the insured is or could be legally obligated to pay the damages. It can be seen at once that Mrs. McDowell, the additional assured, was not and could not be legally obligated to pay damages for injury arising to Mr. McDowell, her husband, in the instant accident.

Thus, the direct action statute of the State of Louisiana discriminates in the application of the laws of the State of Louisiana between Mrs. McDowell, a resident of this State, and an additional assured under the policy, and your appellant, the insurer, herein, in that Mrs. McDowell could not be legally obligated to pay the damages herein but that your insurer who comes to stand in the additional assured's place is thus shackled to pay them.

Conclusion

We respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal, and that in the alternative should such jurisdiction be not found, then in

that event, appellant, National Surety Corporation, prays that by virtue of Title 28, Section 2103, U.S.C.A., the said Supreme Court of the United States invoke its jurisdiction to issue a writ of certiorari in the instant matter directed to the Court of Appeals (First Circuit) of the State of Louisiana.

Dated: April 15, 1954.

Respectfully submitted,

RALPH M. KELTON,
Counsel for Appellant.

APPENDIX 1

OPINION OF THE NINETEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA—Filed December 4th, 1952

No. 40,804

19th Judicial District Court

Parish of East Baton Rouge, State of Louisiana

LOUIS WILBURN McDOWELL

vs.

NATIONAL SURETY CORPORATION AND NATIONAL SURETY MARINE INSURANCE CORPORATION

This is a suit by Louis McDowell against National Surety Company for damages caused by personal injuries suffered by plaintiff as the result of an automobile accident which occurred near Plaquemine, Louisiana, on September 6th, 1951.

The defendant company issued to plaintiff a liability insurance policy on June 8, 1951, which was in full force and effect at the time of the accident, which policy of insurance was offered in evidence and will be found in the record. The limits of liability stated in the policy are as follows: "Bodily injury liability $25,000 each person $100,000 each accident".

It is provided in said policy that the insurer agrees

> "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, *sustained by any person*, caused by accident and arising out of the ownership, maintenance or use of the automobile."

The facts of the case are very clear, and substantially are as follows:

On the day of the accident the plaintiff and his wife drove a car owned by plaintiff and covered by the aforesaid insurance policy to Thibodeaux, Louisiana, to a baseball game. Upon their return trip to Baton Rouge, some distance from Donaldsonville plaintiff's wife took over the driving of the car while plaintiff went to sleep on the back seat thereof.

Shortly thereafter, the car was driven at a speed of forty-five or fifty miles per hour into another vehicle ahead of plaintiff's car and on the same side of the highway, that is, on the right side.

Mrs. McDowell, who, as aforesaid, was driving the car, with respect to the collision said:

> "Well, my husband and I went to a ball game in Thibodeaux, and after the ball game was over we left and started to come home, and out of Donaldsonville—my husband was going fishing the next morning and he wanted to take a nap—so he asked me if I wanted to drive, so I started driving and right about fifteen minutes,—it was misty; and right out of Plaquemine this car was coming toward me and I gave him the dimmers two or three times and he didn't dim his lights and when the car passed me I was blinded and I ran into the back end of the car that was in front of me."

Mrs. McDowell testified that the weather was clear when she took the wheel, but in a few minutes thereafter it became foggy and misty.

She attributes the accident to the blinding lights of the oncoming car and to the condition of the weather, both of which obscured her vision of traffic ahead of her.

As a result of the collision the plaintiff was seriously and painfully injured. Mrs. McDowell testified that she too was injured but the record fails to disclose the extent and nature of her injuries.

Mr. McDowell was knocked unconscious. He sustained a brain concussion, a serious injury to one of his eyes, necessitating its removal, a torn cartilage and several other

bodily injuries leaving scars on his chin and eye lid. The lost eye has been replaced by a glass eye.

Before the accident plaintiff was employed as Captain of the Baton Rouge Fire Department and earned a salary of $275.50 per month. By reason of his physical impairment, particularly the loss of one of his eyes, he was demoted from the position of Captain to a Fire Alarm Operator at a salary of $213.00 per month.

After the accident he spent seven or eight days in hospitals and was incapacitated for any kind of work for four or five months.

According to his own testimony and that of the physicians who testified in the case the plaintiff suffered great pain and now long after the accident, he claims to have severe headaches which one of the physicians stated could easily be attributable to the injury.

Before answering, the defendant filed exceptions of no cause of action and no right of action which were overruled by the Court. Thereafter, the defendant answered, denying most of the allegations of the petition but admitting the issuance of the insurance policy upon which the suit is predicated. It denies however, any liability for the damages under the terms of the aforesaid policy.

In its answer as a special defense and in the alternative defendant attacks the constitutionality of Sections 655 and 983, Title 22, L. R. S. of 1950, as amended, asserting in paragraph 34 thereof that:

> "Said statutes violate the United States Constitution under the particular facts of this case in that: (a) they impair the obligation of defendant's contract with plaintiff, (b) they deprive defendant of its property and rights without due process of law, and (c) they deny to defendant the equal protection of the laws."

In the alternative, and should said sections of the Revised Statutes be decreed to be constitutional, and should the Court find that plaintiff's wife was guilty of negligence which was the proximate cause of the accident defendant

pleads that the aforesaid negligence of the wife is imputed to plaintiff which bars his recovery, for the following reasons, to-wit:

> "(a) At the time of the alleged accident, plaintiff and his wife, Mrs. Cora Maxine McDowell, the driver of plaintiff's automobile, were on a community mission, returning from a base ball game between the Red Sticks of Baton Rouge, Louisiana and the Thibodeaux Indians, which game, plaintiff and his said wife had attended together after having specially gone to Thibodeaux to attend said baseball game."

Further answering, as a special defense, and in the alternative, and in the event that the Court finds that said sections of the Revised Statutes are constitutional and that plaintiff's wife was guilty of negligence which negligence was the proximate cause of said accident, defendant pleads that said negligence is imputable to the plaintiff on the following grounds, to-wit:

> "(a) At the time of the alleged accident, plaintiff and his wife, Mrs. Cora Maxine McDowell, the driver of plaintiff's automobile, were on a mission in the nature of a joint venture, the two having gone to Thibodeaux, Louisiana to attend a baseball game between a Baton Rouge team and the Thibodeaux team, each having a common purpose, each having control of said automobile, each having driven said automobile on said mission, the said Louis Wilburn McDowell, plaintiff, having just previously requested his said wife to drive said automobile."

Finally, defendant pleads that the negligence of plaintiff's wife is imputable to him for the reason that:

> "(a) At the time of the alleged accident, plaintiff's said wife was driving said automobile in the capacity of plaintiff's agent, with the permission of plaintiff and under the direction, control and at the request of plaintiff."

The legal questions presented in this case are:

(1) Can the named insured recover from his insurer for injuries sustained by him as the result of the negligence of *any* person likewise insured, or put in different language, as the result of the negligence of an *added insured.*

(2) Whether the wife under the facts of the case, Mrs. McDowell, was guilty of negligence.

(3) If the wife was guilty of negligence which was the proximate cause of the accident, is such negligence imputable to the husband upon the theory that the trip was made in a community car and for the benefit of the community and that the wife was acting as the agent of the husband.

(4) Whether the fact that the husband can not legally maintain an action for damages against his wife, bars him from the right to recover from his insurer.

(5) Whether the plaintiff was negligent in permitting his wife to drive the car and, lastly,

Whether the fact that the plaintiff and defendant were living together and were on a community mission bars the plaintiff from recovery because the community would be enriched.

Opinion

Let us preface our opinion by saying that from the evidence adduced, Mrs. McDowell was guilty of negligence in the operation of the plaintiff's car, which negligence was the proximate cause of the acident. It is true that the only evidence in the record bearing upon this question is that of Mrs. McDowell. Her account of the accident, however, is not disproved by direct, physical or circumstantial evidence. No explanation was made by either side as to who the party was into whose car Mrs. McDowell ran her car.

However, Mr. T. B. Beale, Jr., representing the defendant company, testified that he interviewed the driver of the other car *and on behalf of defendant paid the owner of the other car for the damage done his car by the collision.* This payment presumably was made by defendant company *because it was of the opinion that the collision was due to the negligence of Mrs. McDowell.*

Aside from this, the law is well settled that when the driver of an automobile is blinded by the lights of another car, he or she should reduce his or her speed to such an extent that the car can be stopped at once if faced with an emergency.

In *Mickens* v. *F. Strauss & Son, Inc.*, 28 So. (2) 84, we find the following at page 87:

> "It has been repeatedly held that when visibility is materially impaired because of smoke, mist, dust, etc., a motorist should reduce his rate of speed to such extent and keep his car under such control as to reduce to a minimum the possibility of accident from collision; and as an extreme measure of safety, it is his duty, when visibility ahead is not possible or greatly obscured, to stop his car and remain at a standstill until conditions warrant going forward. Locke vs. Shreveport Laundries, Inc., supra (18 La. App. 169, 137 So. 645.)"

There are many decisions of the Appellate Courts to the same effect.

Here the driver of plaintiff's car was blinded by the lights of an oncoming car. It was foggy and misty and the car was being driven at a speed of 45 or 50 miles an hour.

In considering the first question posed, namely, can the named insured recover from his insurer for injuries sustained by him as the result of the negligence of an added insured, under the terms of the policy?

The liability insurance policy here involved operates for the benefit *not only of the named insured* but for the benefit of *any person* driving the automobile with the permission of the named insured. Hence, it operated for the benefit of Mrs. McDowell. Here, let us again quote from the policy, Coverage A , as follows: The Insurance Company agrees "To pay on behalf of the *assured* all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * sustained by *any person.*" The words "any person" includes the named insured if he was a passenger in the automobile and the driver was the *assured.* See *Hardner* vs. *Aetna Casualty and Surety*

Company, 189 So. 365. Let us quote from this decision, as follows:

> "Appleman's Automobile Liability Insurance, published in 1938, under the title 'Bodily Injury or Death of Named Insured', on page 135, has the following to say:
>
> 'An attorney unfamiliar with automobile insurance law might be inclined to feel this clause to be pure surplusage. It is conceded that the intention of an automobile policy is to protect the named insured and persons operating with his permission from legal liability, and is not intended to compensate the insured for his own injuries. It is a liability rather than a personal injury policy. In the absence of such a clause, however, the courts have had a sharp conflict of authority and the majority have permitted the named insured to recover for his own injuries. Of course the situation can only arise where a person other than the insured is operating the vehicle. The reason for the majority rule is not without logic. It is somewhat as follows: The insurer intends to protect any person operating with the insured's consent in every case. That operator may have an accident in which he becomes legally liable to the insured for his negligence in operation. If the insurer denies a recovery, then it is not affording complete protection to the additional insured. Since it purports to render complete protection by the omnibus clause the rule of strict construction against the company must be applied. By applying this rule favorably to the additional insured the accident is covered and the named insured permitted to recover."

Obviously, the reasoning of the Courts in holding as they do on this question is that the Insurance Company could exclude in no uncertain terms its *named assured*, and by failing to do so, accepts liability to its named insured if it has adopted *another assured* who operated the vehicle and negligently causes injury.

Learned counsel for defendant contend that in order to apply the law as laid down in the Hardtner case, there must exist a "legal liability" which, they say, does not exist as between the husband and wife. The decision of the Courts interpreting our *direct action* statute, have restricted the words "legal liability" so that the insurer may not plead the personal defense of coverture. See *Edwards* vs. *Royal Ind. Co.*, 161 So. 191; *McHenry* vs. *American Employers Insurance Co.*, 18 So. (2) 840. In this case we find the following:

> "The Supreme Court has held that plaintiff may recover from his wife's insurer the damages sustained by him from her negligence. In view of this holding we cannot perceive any sound reason why he should be barred from recovery because, as head and master of the community, he could have been held to respond in damages to a third person injured by his wife. It certainly is not consistent to say that coverture in this case does not forbid the husband to recover from the wife's insurer and then say he may not recover because the wife was performing a service for the benefit of the community, a legal result of coverture, when the accident happened."

The sum and substance of the defense in this case is first that coverage A of the policy does not include the plaintiff; secondly, that Mr. and Mrs. McDowell were on a community mission or joint venture, and hence McDowell should not be allowed to recover for damages from the insurer if he, McDowell could have been held primarily responsible for the negligent acts of the driver of the vehicle.

As I see the case it is unnecessary to determine whether or not the plaintiff and his wife were or were not on a joint venture, or whether the wife was acting as agent for plaintiff under his direction or control. As a matter of fact, the evidence shows that plaintiff was asleep while his wife was driving the car.

Assuming that plaintiff and his wife were on a community mission, and the wife was therefore, the agent of the husband while driving the car, we are nevertheless

confronted with the *contract of insurance*. The doctrine of respondeat superior (community mission) can not be twisted to the point of denial of contractural obligation. This was clearly settled in the Hardtner case, supra.

In the case of McHenry vs. American Employers Insurance Co., 18 So. (2) 840, the Court recognized that the plaintiff under the terms of the policy was protected against loss if his wife had committed tortuous damage to a third person. It would appear from a careful reading of the decision in that case that even though the husband had certain obligations ex-delicto as head and master of the community, these obligations, nevertheless did not deprive him of certain rights which the insurance company had assumed by contract. As stated, the defense of coverture is personal to the spouse. The doctrine of community mission is merely a legal fiction resulting from the doctrine of coverture. If one is not available to the insurer, the other should not be made available to it.

Defendant attempts to add something more to this case than the defense of coverture. They argue that this relationship was an agency relationship either by means of community mission, joint venture or some other agency relationship. In a word, their argument is that for those reasons the negligence of Mrs. McDowell should be imputed to Mr. McDowell.

The doctrine of *respondeat superior* does not apply as between the principal and agent and it admits of no argument that the principal may recover from the agent if the principal is negligently injured by the tortious acts of the agent. Conceding the correctness of this, then the doctrine of *respondeat superior* is not available as a defense to an insurer who stands in the same shoes as its assured. Therefore, the only distinction between Mrs. McDowell (who was the assured) and any other agent was the fact of coverture. This fact is not available as a defense to the insurer and it is my opinion that if Mrs. McDowell was guilty of negligence, Mr. McDowell should be allowed to recover from her insurer, who has contracted to accept risks of this nature.

These observations, I think, dispose of all of the questions presented, except the alleged unconstitutionality of

Sections 655 and 983, Title 22, L. R. S., which I find to be without merit.

The validity and constitutionality of such statutes have been upheld in various decisions in both State and Federal Courts. See Bouis vs. Aetna Cas. & Surety Co., 91 F. Supp. 954; Hudson vs. Georgia Cas. Co., 57 F. (2) 757; Parker vs. Home Ind. Co., 41 So. (2) 783; Burglass vs. Burglass, 193 So. 275.

We come now to a consideration of the question as to what amount should be awarded the plaintiff as damages.

The evidence shows that at the time of and before the accident plaintiff was a captain in the Fire Department of Baton Rouge at a salary of $275.00 per month. By reason of his disability, particularly the loss of an eye, he was demoted to the position of Beginner Fire Alarm Operator at a salary of $213.00 per month. According to the testimony of Chief Robert Bogan of the Fire Department, it would have been possible for the plaintiff to have kept his position as Captain for an indefinite length of time had it not been for the injury he sustained.

The evidence shows that plaintiff is twenty-eight years old. His life expectancy according to the Mortality Table (R.S. 47; 2405) is 36.73 years. Of course, no one knows how long he will live. In the language of Holy Writ, "In the midst of life we are in death."

It seems to me however, that in determining the amount of the award the plaintiff should receive for permanent disability the Court should consider the fact that plaintiff's earning capacity as a fireman has been reduced by the sum of $62.50 per month. It is very true that for reasons other than for physical disability plaintiff may not have held his position as captain for the term of his life expectancy or for any definite length of time or any definite number of years. For this additional reason, the Court can not say with any degree of certainty how much he would lose in salary as an employee of the fire department.

Sufficeth to say that were this a compensation suit the plaintiff would be entitled to compensation at the rate of 65% of his wages during one hundred weeks, with a maximum of $30.00 per week.

It is my opinion that an award of $15,000.00 should be allowed as damages for permanent disability plaintiff sustained, including the loss of his eye, and that in addition thereto he should be awarded $2500.00 for pain, suffering and mental anguish, and that he should also recover the sum of $211.50 medical bills, $33.00 as hospital bills and $140.00, the cost of a permanent glass eye. All of these items amount to the total sum of $17,924.50.

Judgment will therefore be rendered in favor of the plaintiff and against the defendant in accordance with the views herein expressed and in the amount hereinabove stated.

(S.) Chas. A. Holcombe,
Judge, 19th Judicial District Court.

[File endorsement omitted.]

APPENDIX 2

Opinion of the Court of Appeal for the First Circuit of the State of Louisiana—Filed October 5, 1953

Court of Appeal, First Circuit, State of Louisiana

Louis Wilburn McDowell,

vs.

National Surety Corporation, et al.

Appeal from the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, Louisiana, Honorable Charles A. Holcombe, Presiding Judge.

Lottinger, *Judge:*

This is a suit for damages by Louis Wilburn McDowell against National Surety Corporation and the National Surety Marine Insurance Corporation. The claim is for the total sum of $24,690.00 for personal injuries suffered by petitioner resulting from an automobile accident. The

lower court rendered judgment in petitioner's favor in the sum of $17,924.50. Defendant has taken this appeal.

The facts, as found by the lower court, and which are not seriously disputed, are as follows. The defendant company issued to petitioner a liability insurance policy on June 8, 1951, which policy was in full force and effect at the time of the accident. The limits of liability stated in the policy are as follows: "Bodily injury liability $25,000 each person $100,000 each accident". It is further provided in said policy that the insurer agrees

> "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile."

On the day of the accident, the petitioner and his wife drove the car owned by petitioner and covered by the said liability insurance policy to Thibodaux, Louisiana, to a baseball game. Upon their return trip to Baton Rouge, some distance from Donaldsonville, petitioner's wife took over the driving to the car while petitioner went to sleep on the rear seat. The evidence shows that Mrs. McDowell was a competent driver, and had never had an accident during her some ten years of driving.

Shortly after Mrs. McDowell took over the driving, she was driving at a speed of forty-five to fifty miles per hour when the weather became foggy. She slacked her speed little, if any, although her visibility was reduced by the fog. She was approached by an automobile coming in the opposite direction, the driver of which neglected to give her his dimmers, although Mrs. McDowell signalled for his dimmers two or three times. She became blinded by his bright lights, and collided with another vehicle traveling in the same direction as Mrs. McDowell and on the same side of the highway. The first thing Mrs. McDowell saw of the automobile with which she collided was a "turning wheel". She attributes the accident to the blinding lights of the oncoming car and to the condition of the weather, both

of which obscured her vision. Prior to the time that she took the wheel, the weather was clear.

As a result of the collision, the petitioner was knocked unconscious. He sustained a brain concussion, a serious injury to one of his eyes, necessitating its removal, a torn cartilage and several other bodily injuries leaving scars on his chin and eye lid. The lost eye has been replaced by a glass eye.

Prior to the accident, petitioner was employed as Captain of the Baton Rouge Fire Department and earned a salary of $275.50 per month. By reason of his physical impairment to his sight, he was demoted from the position of Captain to a Fire Alarm Operator at a salary of $213.00 per month.

The injuries required petitioner to spend seven or eight days in hospitals and he was incapacitated from any kind of work for four or five months. According to his own testimony and that of the doctors who testified in the case, the petitioner suffered great pain and now, long after the accident, he claims to have severe headaches which, one of the doctors stated, could easily be attributed to the injury.

Defendant first filed exceptions of no cause or right of action, which were overruled by the lower court. The defendant then filed answer denying most of the allegations of the petition but admitting the issuance of the insurance policy upon which the suit is predicated. It denies, however, any liability for the damages under the terms of said policy.

The lower court rendered judgment in favor of petitioner in the amount stated above. The defendant has taken this appeal.

The defendant assigns as errors committed by the lower court, the following reasons:

1. Louisiana Revised Statutes, Title 22, Section 655, for the year 1950, as Amended, which authorizes a direct action against an insurer does not contemplate an action of the nature herein alleged upon and in fact the statute prohibits such a suit as specifically set forth therein.

2. Plaintiff's petition and all of the evidence adduced specifically shows that plaintiff and plaintiff's wife were on a community mission in the nature of a joint venture and any negligence on the part of plaintiff's wife acting as the agent of the community is imputed under the law of Louisiana to plaintiff, her husband, and bars his recovery.

3. Both section 655, Louisiana Revised Statutes of 1950, as amended, and the judgment rendered herein by the Honorable Lower Court are in clear violation and contravention of the United States Constitution, Article 1, Section 10, and the Fourteenth Amendment thereto.

4. Plaintiff's suit should be dismissed for the reason that the evidence introduced does not show that Mrs. McDowell was negligent and that her negligence was the proximate cause of the accident.

5. In any event and with all factors considered, the judgment rendered herein by the Honorable Lower Court exceeds a genuinely reasonable amount by more than one-half, and should be reduced.

We will discuss the alleged reasons of error by the lower court, in the order given above.

Defendant claims that R. S. 22:655, which provides for a direct right of action against the insurer, clearly states that it is the intent that defendant has the same defenses as the insured and that petitioners right of action is subject to all of the lawful conditions of a policy or contract that could be urged by his wife, Mrs. McDowell. No cases are cited in support of its contention. The portion of the statute which is particularly referred to in its allegation that the same defenses are available to the defendant as are available to the insured, reads as follows:

> ". . . It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

Our interpretation of the quoted portion of the statute is that the insurance company shall have any defenses in a direct action brought by the injured party that it would have to an action brought by its insured. Suppose, for instance that an injured party chose, instead of suing the insurer, to sue the insured party and was awarded judgment. There would be no question then that the insured party could sue his insurer for the amount collected by the injured party. The direct action statute merely gives to the insurance company any defense in the direct action which it might have had in an action by its insured.

In this case, although the policy of defendant was issued in the name of petitioner, according to the terms and conditions of the policy, the insured party, under the clear wording of the policy as will be discussed later, was Mrs. McDowell. Although the defendant has not indicated any defense in particular which he claims would come under the quoted portion of the statute, we assume that he means that the personal defense of coverture available to Mrs. McDowell to a suit instituted against her by her husband would, in this case, inure to the benefit of the defendant insurer. Such a situation, as we see it would not be covered by the provision of the statute. This defense would not have been available to the defendant (insurer) in a direct action against it brought by the insured (Mrs. McDowell). Recovery has been allowed in similar cases in our jurisdiction. Edwards v. Royal Indemnity Co., 161 So. 191; McHenry v. American Employers Ins. Co., 18 So. (2d) 656 & 843; Hardtner v. Aetna Casualty Co., et al 189, So. 365 and Scarborough v. St. Paul Indemnity Co., 11 So. (2d) 52.

The defendant next claims that petitioner and his wife were on a community mission in the nature of a joint venture and any negligence on the part of petitioner's wife would be imputed to petitioner and would bar his recovery in this matter. We feel that there is no doubt that the couple were on a community mission in the nature of a joint venture. In the event that suit had been instituted by a third party, the petitioner would have been held liable for the negligent acts of his wife under the rules pertaining to the principal and agent relationship. However, there is no third

party suing in this case. The situation presented here is one where the principal is attempting to recover for the negligent acts of his agent, and there can be no quarrel against recovery having been allowed many times in such a situation. In McHenry v. American Employers Insurance Company (supra) the court said:

> "The Supreme Court has held that plaintiff may recover from his wife's insurer the damages sustained by him from her negligence. In view of this holding, we cannot perceive any sound reason why he should be barred from recovery because, as head and master of the community, he could have been held to respond in damages to a third person injured by his wife. It certainly is not consistent to say that coverture in this case does not forbid the husband to recover from the wife's insurer and then say he may not recover because the wife was performing a service for the benefit of the community, a legal result of coverture, when the accident happened."

In Hardtner v. Aetna Casualty Co., et als, (supra) the court said:

> "The only way or theory upon which negligence of one person may be imputed to another is under that of agency; and even when the relationship of master and servant, or principal and agent exists, the principal or master has a cause of action against the agent or servant for the damage the principal or master has suffered by the wrongful acts of his agent or servant."

In the instant case the wife, in driving the car, was acting as agent for the community of acquets and gains. As to any damages to third persons, the negligence of the wife would have been imputed to the husband, the principal in the community agency. Thus, he would have had no defense to an action instituted by third persons, under the circumstances of this case. However, in the agency relationship, the law allows the principal to recover from the agent for the damages sustained by the principal as a result of the negligent acts of the agent. The same principal would

apply here. Although the petitioner could not have brought a direct action against his wife under our rules of coverture, the defense of coverture is personal to the wife and would not inure to the benefit of the insurance company herein. We, therefore, feel that the second assignment of error by defendant is without merit.

Defendant next contends that R. S. 22:655 and the judgment rendered below are in violation of the United States Constitution, Article 1, Section 10, and the Fourteenth Amendment thereto. It claims that the right of direct action given by the statute impairs the obligation of contract and deprives the defendant of its property without due process of law.

The said statute has been held constitutional. Churchman v. Ingram, 56 So. (2d) 297, 307. Furthermore, the defendant, being an insurer doing business in the State of Louisiana, has consented to be sued in Louisiana directly by an injured party. The policy itself provides:

> "23. TERMS OF POLICY CONFORMED TO STATUTE. Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes."

In this connection, in Buxton v. Midwestern Ins. Co., 102 F. Supp. 500, the court said that the insurer in return for the privilege of doing business, had consented to the direct action. "It cannot say yes or I do in one breath and no or I do not or will not in another."

Defendant's fourth contention of error is that the evidence failed to show negligence on the part of Mrs. McDowell and that her negligence was the proximate cause of the accident. On this point, the lower court stated as follows:

> "Let us preface our opinion by saying that from the evidence adduced, Mrs. McDowell was guilty of negligence in the operation of the plaintiff's car, which negligence was the proximate cause of the accident. It is true that the only evidence in the record bearing upon this question is that of Mrs. McDowell. Her account of the accident, however, is not disproved by direct,

physical or circumstantial evidence. No explanation was made by either side as to who the party was into whose car Mrs. McDowell ran her car.

However, Mr. T. B. Beale, Jr., representing the defendant company, testified that he interviewed the driver of the other car *and on behalf of defendant paid the owner of the other car for the damage done his car by the collision.* This payment presumably was made by defendant company *because it was of the opinion that the collision was due to the negligence of Mrs. McDowell.*

Aside from this, the law is well settled that when the driver of an automobile is blinded by the lights of another car, he or she should reduce his or her speed to such an extent that the car can be stopped at once if faced with an emergency.

In Mickens vs. F. Strauss & Son, Inc., 28 So. (2d), 84, we find the following at page 87: 'It has been repeatedly held that when visibility is materially impaired because of smoke, mist, dust, etc., a motorist should reduce his rate of speed to such extent and keep his car under such control as to reduce to a minimum the possibility of accident from collision; and as an extreme measure of safety, it is his duty, when visibility ahead is not possible or greatly obscured, to stop his car and remain at a standstill until conditions warrant going forward. Locke v. Shreveport Laundries, Inc., supra (18 La. App. 169, 137 So. 645).'

There are many decisions of the Appellate Courts to the same effect.''

Although Mrs. McDowell was the only witness who testified as to the actual cause of the accident, her evidence clearly shows that the accident was caused solely by her negligence in proceeding at too great a speed under the foggy conditions, and driving while being blinded by the headlights of an approaching car. Had she reduced her speed to what was reasonable and proper under the circumstances, she could have stopped within her vision and the accident would have been avoided. It is the established jurisprudence of this state that the driver of a vehicle is

required to maintain such control over his automobile as to permit him to bring it to a stop within the range of his lights and it is further negligence in failing to decrease his speed when temporarily blinded by the headlights of an approaching vehicle. It is further well established as the jurisprudence of this state that when a driver of a vehicle finds that he is unable to see the road ahead of him, for any reason whatever, whether blinded by bright lights, smoke, dust, fog or for any other reason, it is his duty to at least bring his car under such control that it can be stopped in a moment in case of an emergency and in extreme cases, it is his duty to stop. See Rachal v. Balthazar 32 So. (2d) 483 and Dauzat v. Kelone et al. 65 So. (2d) 924. Therefore, we are of the opinion that Mrs. McDowell was negligent and that her negligence was the proximate cause of her husband's injury. We are not of the opinion that this is one of the exceptional type of cases that would relieve Mrs. McDowell of negligence. Furthermore, even were we to consider that Mrs. McDowell's negligence was not the sole cause of the accident, but was merely a contributing cause, the petitioner would still have his right of action, as the courts have held that when a defendant is responsible for one, two or more proximate causes of an injury, he cannot escape liability because a third person is responsible for a concurrent proximate cause. Abrego v. Tri-State Transit Co. 22 So. (2d) 681, 683; Shield v. Johnson & Co., Ltd., 132 La. 773, 61 So. 787.

Before proceeding with defendant's last assignment of error, that of quantum, we feel it our duty to dwell further on what we feel to be the major point at issue in this case, and which is a question res novo in our jurisdiction. This question is, can the husband, the named insured in a liability policy, recover from his insurer for injuries sustained by him as a result of the negligence of his wife, who is driving with his permission, under the terms of the policy.

Coverage A of the policy, which was introduced into evidence provides that the insurance company agrees:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as dam-

> ages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by *any person*, caused by accident and arising out of the ownership, maintenance or use of the automobile."

The policy further provides, in Section III, under Definition of Insured, as follows:

> "With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes *any person* while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission."

In the present case, it is clear from reading Section III of said policy, that Mrs. McDowell was an insured under the terms thereof. She was driving with the permission of the named insured. Furthermore, keeping in mind that Mrs. McDowell was the insured, and by reading Coverage A of the policy, it is clear to us that the company is liable, on behalf of the insured, for bodily injury, sickness or disease sustained by *any person* caused by an accident of the automobile. The terminology "any person" is a broad one. Had the company desired to qualify this phrase, they could easily have done so. As a matter of fact, the policy did list certain exceptions, or exclusions, one of which, as pertains to the property damage liability, reads as follows:

> "(F) The policy does not apply . . . to injury to or destruction of property owned by, rented to, in charge of or transported by the insured."

This exclusion is clear, and relieves the insurer of liability for damage to property owned by, or in the charge of, the insured. Certainly had the insurer desired to relieve itself of liability for personal injuries to the named insured, it could easily have done so by inserting appropriate language to that effect into the policy.

As to the provisions of the policy, the lower court, found as follows:

"The liability insurance policy here involved operates for the benefit, not only of the named insured but for the benefit of *any person* driving the automobile with the permission of the named insured. Hence, it operated for the benefit of Mrs. McDowell. Here, let us again quote from the policy, Coverage A, as follows: The Insurance Company agrees 'To pay on behalf of the *assured* all sums which the insured shall become legally obligated to pay as damages because of bodily injury * * * sustained by *any person.*' The words 'Any person' includes the named insured if he was a passenger in the automobile and the driver was the *assured.* See Hardtner vs. Aetna Casualty and Surety Company, 189 So. 365. Let us quote from this decision, as follows:

'Appleman's Automobile Liability Insurance, published in 1938, under the title 'Bodily injury or Death of Named Insured', on page 135, has the following to say:

'An attorney unfamiliar with automobile insurance law might be inclined to feel this clause to be pure surplusage. It is conceded that the intention of an automobile policy is to protect the named insured and persons operating with his permission from legal liability, and is not intended to compensate the insured for his own injuries. It is a liability rather than a personal injury policy. In the absence of such a clause, however, the courts have had a sharp conflict of authority and the majority have permitted the named insured to recover for his own injuries. Of course the situation can only arise where a person other than the insured is operating the vehicle. The reason for the majority rule is not without logic. It is somewhat as follows: The insurer intends to protect any person operating with the insured's consent in every case. That operator may have an accident in which he becomes legally liable to the insured for his negligence in operation. If

the insurer denies a recovery, then it is not affording complete protection to the additional insured. Since it purports to render complete protection by the omnibus clause the rule of strict construction against the company must be applied. By applying this rule favorable to the additional insured the accident is covered and the named insured permitted to recover.'

Obviously, the reasoning of the Court in holding as they do on this question is that the Insurance Company could exclude in no uncertain terms its *named assured*, and by failing to do so, accepts liability to its named insured if it has adopted *another assured* who operates the vehicle and negligently causes injury."

Under the holdings of the Hardtner and McHenry cases the petitioner should be allowed recovery from his insurer for injuries suffered from the negligence of his wife, the insured under the omnibus clause of the policy.

As to any question relative to negligence on the part of petitioner, we feel that there was none. The facts show that Mrs. McDowell had been driving a car for some ten years. Testimony shows that she had, on several occasions, driven at night. She had never had an automobile accident. On the night in question, and at the time of the accident, petitioner was on the back seat asleep. We do not feel that these facts show any negligence whatsoever on the part of the petitioner.

As to the question as to whether recovery in this suit would unjustly enrich the community existing between petitioner and his wife, the Supreme Court, in McHenry v. American Employers Insurance Co., stated: ". . . the community will not be enriched but will only be reimbursed for the loss it has sustained as a result of the accident."

The lower court gave judgment for petitioner in the total sum of $17,924.50. The petitioner claims said sum to be inadequate, whereas the defendant claims it to be excessive.

Of said sum, $15,000.00 was allowed for permanent disability sustained by petitioner, including the loss of his eye. The petitioner was 28 years of age at the time of the accident. Because of the loss of the eye, he was reduced from rank of Captain in the Fire Department, paying a salary

of $275.50 per month, to that of Beginner Fire Alarm Operator, paying a salary of $213.00 per month. Under the Mortality Table (R. S. 47:2405) petitioner had a life expectancy of 36.73 years at the time of the accident. While there was the possibility of advancement from the rank of Captain, there is now a possibility of advancement from the rank of Beginner Fire Alarm Operator. The evidence shows that, because of the injuries, petitioner lost some six months from his work. Under the circumstances, we believe that the allowance of $15,000.00 was neither inadequate or excessive.

The lower court further allowed $2500.00 for pain and suffering, $211.50 for medical bills, $33.00 as hospital bills and $140.00 as cost of a permanent glass eye. The evidence shows that the injuries, especially to the eye, were extremely painful. Petitioner, at the time of trial, was still suffering from headaches, a likely result of said injuries. We believe that the damages, as awarded, were proper.

For the reasons assigned, the judgment of the lower court will be affirmed.

Judgment Affirmed.

[File endorsement omitted.]

ELLIS, Dissenting:

Plaintiff has reurged its exceptions of no right or cause of action which the learned trial judge under the authority of McHenry v. American Employers Ins. Co., 18 So. 2d, 840, and Hardtner v. Aetna Casualty & Surety Co., 189 So. 365 felt "constrained to overrule."

There is no doubt that the plaintiff, the named insured, and his wife, the additional insured, were on a community mission in the nature of a joint venture. The majority opinion found this to be a fact and stated: "We feel that there is no doubt that the couple were on a community mission in the nature of a joint venture." Again in the opinion it is stated: "In the instant case the wife, in driving the car, was acting as agent for the community of acquests and gains." With both of these statements I thoroughly agree, however, the majority based its decision upon the McHenry

and Hardtner cases. In my opinion, the McHenry case is entirely different from the case at bar.

The Supreme Court found the facts of the McHenry case as established by the record to be:

> "That the accident happened solely from the carelessness and actionable negligence of Mrs. McHenry; that at the time of the accident she was acting within the scope of her employment and had begun a mission in the interest of her said employer,"

and stated the question for decision to be:

> "In view of the related facts and findings, is the plaintiff entitled to recover from the insurer the damages, in whole or part, for which he sues?"

Additional facts which were considered by the Supreme Court were stated to be:

> "Plaintiff is the husband of Mrs. Bessie D. McHenry, between whom the community of acquest and gains exists. Mrs. McHenry, on the date of the accident involved herein, was in the employ of the Welcome Wagon Service Company, and had been so employed for several years. When the accident occurred there was in force an automobile liability insurance policy issued by defendant, American Employers' Insurance Company, wherein Mrs. McHenry and the Welcome Wagon Service Company were named as 'the insured.' The automobile involved in the accident is specifically covered by said policy . . .
>
> • • • • •
>
> "In the morning of June 28th, 1941, Mrs. McHenry, while backing the insured automobile from the premises of herself and husband, lost control thereof and it struck plaintiff, the husband, inflicting serious and painful injuries to him. He instituted this suit against said insurer (reserving his right to sue the Welcome Wagon Service Company) to recover damages sustained by him, alleging that the accident was caused

solely by the negligence, in several respects of Mrs. McHenry . . ."

Thus it is clear that in that case the wife was not on a community mission at the time of the accident, the husband was not in the automobile, was not in control nor did he have the right to control the automobile at the time of the accident; he was not a party to the contract of insurance, whereas in the present case it is admitted that at the time of the accident the wife was operating the car with the husband's permission and consent and he was in the car and he was the named insured in the policy while his wife was the additional insured under the omnibus clause. Under these facts I do not think that the McHenry case is controlling or that the language used by the learned Judge of the Second Circuit and quoted in the majority opinion should be controlling in this case where the facts are entirely different.

As to the Hardtner case, supra, on the question of the right of a named insured to sue his or her own liability insurer, I respectfully disagree. Briefly stated, the Hardtner case adopted the view expressed in some other jurisdictions that should the insurance company wish to exclude the named insured from suing his or her own liability insurer it should have specifically inserted a clause or paragraph to that effect. I feel and believe that the opposite view as shown by cases in other States and as cited and discussed in the Hardtner decision to be more logical in the light of the terms and conditions of the policy in question. The liability policy in the case under consideration imposes on the plaintiff the following obligation among others:

"Assistance and Cooperation of the Insured=Coverages A, B, C, D, E, F, G, H, I and J. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than

for such immediate medical and surgical relief to others as shall be imperative at the time of accident."

I agree with the views expressed in Johnson v. Employers Liability Assurance Corporation, 158 Misc. 758, 285 N. Y. S. 574, 580, which is cited, commented upon and quoted in the Hardtner case as follows:

"In this case the 'omnibus cover' protected the operator of the automobile from liability to 'any person', the same provision interpreted in the cases heretofore quoted from. The Johnson case held as follows: 'View it any way we may, the facts remain that plaintiff's policy, his contract with defendant, was one of indemnification for liability, and that he was a privy thereto for such expressly declared purpose. This contract is the basis of the present action. He sues upon it, not for indemnification, but, divorcing himself as a privy thereto, he sues upon it to be compensated for injuries caused by his licensee, who, by his, the plaintiff's act, procured the instrument and used it and thereby caused him harm. True, the 'omnibus cover' protected Durking, plaintiff's licensee, from liability to any person, but it did so only while he was operating plaintiff's automobile with the latter's consent. This protection was thus extended not as a separate and independent agreement with Durking, and apart from the real subject matter and paramount purpose of the policy. Indeed this extension of protection is inseparably connected with such purpose. The statutes (Vehicle and Traffic Law, S 59; Insurance Law, S 109) render this certain. The extension of protection was a detail of the protection afforded plaintiff the named assured. It merely afforded additional protection which covered his extended statutory liability. Plaintiff therefore cannot assume the role of 'any person' and thus divorce himself from his status as one of the two contracting parties, whose contract was made to protect him from the demands of such person. To hold otherwise would be to read into the policy another contract, one well known in the science and business of insurance, but

certainly absent here, namely, one for personal accident insurance. Consideration of other features of the policy in question confirm these views. It is impossible to harmonize a contrary view with plaintiff's affirmative obligations under the contract having to do with co-operation in resistance of unjust demands, and hopeless confusion attends such a view when adherence is called to the subrogation provisions of the policy. Plaintiff's unavoidable status as privy to the contract in question presents the anomaly here of this being a suit, in effect, against himself. For he must sue upon his own policy, not that of Durking. For Durking had no contract separate and apart from his. The protection plaintiff contracted for on account of Durking's act he does not seek. Even under the omnibus coverage, that is all the contract affords him.' "

In a recent brief in the case of Mrs. Pauline Anne Piazza Messina v. Audubon Insurance Company, — So., 2d —, involving the same question but which this Court found unnecessary to pass upon, the Hardtner case was distinguished on the following grounds:

". . . For example, the reported decision does not show whether or not the policy provisions we have quoted were in the policy involved in that case. The Hardtner case, moreover, is distinguishable because: (1) There the named insured was instantly killed and couldn't 'co-operate' or harm the insurer by 'non-cooperation,' or attempted admissions of fault; (2) there the 'additional insured' under the omnibus clause who caused the death of the owner-insured was not a 'spouse or member of the family of the named insured' as in the present case; and (3) our Supreme Court in the meantime in the Brantley [19] case by overruling of Adams v. Golson [20] has established at least a limited 'family purpose doctrine.' "

"[19] Brantley vs. Jackson, 46 So. 2d 614.

[20] 174 So. 876."

For the brief reasons given, I am of the opinion that the exception of no right or cause of action should have been sustained and plaintiff's suit dismissed.

I believe it to be my duty to further express my views on the merits of the case and in doing so I do not wish to convey any impression that I am not of the firm opinion that the exception should have been sustained. With this understood, I am of the opinion that on the merits of the case the plaintiff has failed to bear the required burden of proof.

The only testimony we have as to the accident is that of plaintiff's wife who was driving the car at the time while he took a nap on the back seat. As the testimony is rather brief it can be used to speak for itself rather than by a summation. It is as follows:

"Q. Tell the Court how you happened to be out there?

A. Well, my husband and I went to a ball game in Thibodeaux, and after the ball game was over we left and started to come back home, and out of Donaldsonville—my husband was going fishing the next morning and he wanted to take a nap—so he asked me if I wanted to drive, so I started driving and right about fifteen minutes,—it was misty, and right out of Plaquemine this car was coming toward me and I gave him the dimmers two or three times and he didn't dim his lights and when the car passed me I was blinded and I ran into the back end of the car that was in front of me.

Q. Where was Mr. McDowell all this time?

A. He was asleep on the back seat.

Q. Will you describe the weather when you started driving out of Donaldsonville?

A. The weather was clear when I started driving.

Q. About how long had you been driving from Donaldsonville until the accident happened, more or less?

A. Well, it was just a few minutes.

Q. About how long would you say?

A. Fourteen minutes.

Q. Do you know how far it is between Donaldsonville and Plaquemine more or less?

A. Approximately fourteen or fifteen miles.

Q. And you say the accident happened just out of Plaquemine?

A. Yes.

Q. Before you arrived into Plaquemine?

A. That's right.

Q. What was the first time that you saw the car in front of you before you ran into it,—rather what was the first thing that you saw of the car in front of you before you ran into it?

A. As if a wheel was turning in front of me.

Q. About how fast were you driving?

A. Approximately forty-five to fifty miles an hour."

• • • • • • •

"Q. How many times did you dim your lights to the other car?

A. Two or three times.

Q. Were his lights bothering you?

A. They were blinding me; I couldn't see.

Q. And you say you were traveling between forty-five and fifty miles an hour?

A. That's right."

• • • • • • •

"Q. What condition was the weather at the time you left Thibodeaux?

A. It was clear.

Q. Where did it change?

A. I would say I started driving out of Donaldsonville and I had been driving a few minutes when it goes misty-like.

Q. About how many miles?

A. About fifteen minutes I would say, fourteen or fifteen minutes.

Q. How fast were you driving when you left Donaldsonville?

A. Well, when I left Donaldsonville I was driving about forty-five or fifty miles an hour.

Q. You drove at the rate of forty-five or fifty miles an hour from the time you took over the wheel until the accident occurred, is that correct?

A. Well, yes.
Q. Beg your pardon.
A. Yes.
Q. You didn't check your speed when you hit the fog?
A. No.
Q. I didn't understand?
A. I might have a tiny bit.
Q. You don't know whether you checked your speed or not, is that correct?
A. I didn't notice.
Q. I beg your pardon.
A. I checked it maybe a little bit but I didn't slow down or stop.
Q. How little?
A. I would say to about 42.
Q. You slowed down to 42?
A. I slowed down and then I speeded up again."

Under the general rule one who runs into a parked or moving vehicle is negligent, however, there is an exception to this rule. Lovelace v. Gowan, 52 So. 2d 97; Gaiennie v. Co-operative Produce Co., 196 La. 417, 199 So. 377; Rea v. Dow Motor Co., La. App., 36 So. 2d 750; Lynch v. Fisher, La. App., 41 So. 2d 692.

It was incumbent upon the plaintiff to prove by sufficient facts that the case at bar did not come under the exception to the general rule. It will be seen from the testimony that the wife of the plaintiff was driving at a most reasonable rate of speed and she fails to testify that she was blinded in the least by the mist. It will be noted that she referred to the condition of the weather by saying: "It was misty." I would not interpret this as meaning any condition of the weather that was blinding or affected her vision in driving. She did testify to a car coming toward her which evidently had bright lights as she gave him the "dimmers two or three times, and he did not dim his lights," and she next says, "When the car passed me I was blinded and I ran into the back end of the car that was in front of me." In connection with this testimony it is well to recall her testimony as to the first thing that she saw of the car in front of her before she ran into it, and her answer was "As if a wheel was turn-

ing in front of me." As I understand this testimony, plaintiff's wife was driving along at a reasonable rate of speed with nothing to impair her vision for if the mist was a thick fog it was plaintiff's duty to prove it, and there is no such testimony. In the ordinary course of traveling at night she approached a car coming toward her with bright lights; she does not say that she was blinded immediately by these lights but states that she dimmed her lights two or three times and evidently kept traveling. She does not state the distance between her car and the approaching car with the bright lights at the time she dimmed her lights, and she does not testify at that time that she was blinded, therefore, there was no necessity for her to slow down. It was only when the car "passed me I was blinded." Nowhere in her testimony or in the record does it show that she saw the car in front of her until she struck it just after passing the approaching car. She never testified that the car in front of her did or did not have tail lights. She never testified whether the car was going forward or backward or whether it could have been stopped in the road. It is only by her testimony that when she first saw the car it was "as if a wheel was turning in front of me that we might guess it was moving. When one sees the turning wheels of a car without seeing or mentioning having seen any tail lights, there is a strong presumption that there were no tail lights. There is no testimony as to the kind, make or age of the car the plaintiff struck. The fact that the wife did not see anything between her car and the approaching car with the bright lights is also strong evidence in my opinion that the case comes under the exception to the general rule. There is no positive, direct testimony in answer to a direct or positive question as to just what plaintiff's wife did when the car was approaching with the bright lights other than dim her lights two or three times. There is an inference that she continued at 45 or 50 miles per hour because she did not say that she slowed down. There is no reason why the plaintiff's wife should not have furnished complete testimony, if it were true, to remove this case from the exception.

In his reasons for judgment the Trial Judge of the Lower Court stated that a representative of the defendant company testified that he interviewed the driver of the other car and

on behalf of defendant paid the owner of the other car for the damage done in the collision, and he observed that this payment presumably was made by the defendant company because it was of the opinion that the collision was due to the negligence of plaintiff's wife. At the time this testimony was sought, an objection was made and it was the Court that then elicited from the witness the fact that the defendant company had compromised the claim and the Court then remarked: "Mere payment don't establish fault." In this he is correct.

For the above reasons, I am of the opinion that the plaintiff has failed to bear the burden of proof incumbent upon him and on this ground should be denied recovery.

If one should accept the finding of the majority that plaintiff's wife was negligent, then the plaintiff could not recover as it is admitted that she was the agent of her husband on this occasion and he was also an occupant of the car, and the fact that he was asleep at the actual time of the accident would not change his responsibility for the results of his wife's negligence.

In Weitkam et ux v. Johnston, 5 So. 2d 582, the owner of the car was having his daughter drive it "returning from a visit, the purpose of which the record does not disclose," and the Court held:

> "Miss Wietkam, at the time, was operating her father's car and was his agent, and therefore, because of her negligence, he is precluded from recovery since her negligence is to be imputed to him. See Gannon v. New Orleans Ry. & Light Co., 157 La. 435, 97 So. 601."

See also Wolfe v. Toye Bros. Auto and Taxicabs Co., Inc., et al., 18 La. App. 321, 138 So. 453, in which the Court stated:

> "There is no doubt that a parent merely by reason of the relationship is not responsible for negligent acts of his or her major children; but here we find from the evidence that the automobile in question belonged to Mrs. Hardie, that she was riding therein, and that, according to her statement, it is probable that she had asked her son to drive her to the railroad station to meet her parents. It is quite true that on various prior occasions the

son, on his own initiative, had driven to the station to meet defendant's parents, his grandparents, and it is equally true that had an accident occurred on those occasions in all probability there would have been no liability in Mrs. Hardie, but here it appears that the son, though a major, was driving her in her car and we feel that, thus, on this particular occasion, he was acting as the agent of his mother and that she should be responsible for the results of his negligent deeds while so acting."

In Vol. 12 of Louisiana Law Review at pages 323-327 Mr. Garner R. Miller discusses similar cases, and in reviewing these cases and Buquet v. St. Amant, 55 So. 2d 645 he had this to say:

"If the purpose of the journey is for the benefit of the owner, even though it is also for the benefit of him who is permitted to drive, the owner under principles of agency is regarded as master of the driver even though no wages or reward other than the participation in the drive is paid to him. It has been stated that where an owner occupies the car at the time of the accident he is liable for the negligence of the driver if (1) he has not abandoned his right to control the car or (2) if he exercises or has a right to exercise any control over the driver or the operation of the car, or (3) if the ride is for his benefit or for the mutual benefit of himself and the driver. An examination of the language of the court in the Buquet case would lead one to the conclusion that the case falls within the scope of the law of agency."

Therefore, under the above authorities plaintiff could not recover.

Furthermore, the plaintiff being in the car himself with the right to control and supervise even if the driver had not been his wife and agent, he should be denied recovery.

In Monroe v. Heard, et al., 168 So. 519, this Court held:

"The liability of the occupant of an automobile driven by another under his direction and control is stated in

42 Corpus Juris at page 1123 as follows: 'So likewise where the occupant, although he is not the owner and is not driving the vehicle himself, is in actual control of its operation, or where he has the right to control, and direct the driver and fails to do so, or where, being in control, he permits another to drive, he will be held responsible for an injury sustained by a third person by reason of the negligent operation of the vehicle.' In support of that proposition the case of Smith v. Sladovich, 3 La. App. 527, is cited in the footnotes. In the Smith v. Sladovich case, the court said: 'If Rosengarten, Junior, had been the owner of the car, there could have been no question of his liability. We think he is in the position of owner so far as his responsibility for the operation of the car is concerned.' "

See also Lyle v. Guillat, 143 So. 511; Mustin, et al. v. West, et al., 46 So. 2d 136; Huerstel, et al. v. L Mangono & Co., 39 So. 2d 460; Vol. 5, American Jurisprudence "Automobiles", Sec. 354: Grantham v. Smith, 18 App. 519, 132 So. 805; Smith v. Sladovich, 3 La. App. 527.

Another reason that plaintiff should not recover under the facts in this case is because he and his wife were at the time engaged in a joint venture. See Squares v. Baldwin, et al., 185 So. 14, 191 La. 249; Buquet v. St. Amant, 55 So. 2d 645. In view of the community mission, the agency and joint venture, the negligence of the wife is imputed to the plaintiff and he is not entitled to recover.

The majority opinion on the question of agency cites Hardtner v. Aetna Casualty Co., et als., supra, and quotes therefrom. On page 370 of the Hardtner case, directly following the quotation in the majority opinion, it is stated:

"In the case of Costa v. Yochim, 104 La. 170, 28 So. 992, 993, the court said: 'While the master is liable to third persons for injury arising from his servant's negligence within the scope of his employment, if the master is free from fault as to negligence in question he may have his remedy against his servant for damages to which he is thereby subjected, and the measure of damages, in such case, is the amount of the recovery against the master.' "

Under the above quoted authority, it is clear that a master cannot recover from his servant unless he is free from fault as to the negligence in question. In the present case the plaintiff is not free from fault as the negligence of his wife is imputed to him.

The Hardtner case, supra, was before the Second Circuit only on an exception of no cause or right of action and the only thing decided was that the affirmative allegations of the plaintiff's petition did not show on their face independent, contributory or imputed negligence, and the Court therefore overruled the exception. The case was not tried on its merits. Had it been, the defendant would not have been debarred from attempting to show that the deceased Hardtner was guilty of either independent, contributory or imputable negligence.

As to the language used by the organ of the Court in the McHenry case and which is quoted in the majority opinion, it must be construed in the light of the facts and circumstances as stated by the Supreme Court when the case was before it which formed the basis for the answer to the question certified to that Court.

In the case of Levy v. New Orleans & Northeastern R. Co., 21 So. 2d 155, on an application for a rehearing in its per curiam the Orleans Court of Appeal distinguished the McHenry case and said:

> ". . . The Court held that in such a case the community is not profiting as a result of the negligence of the wife but is merely being permitted to obtain reimbursement for a loss already sustained. There, however, the automobile, which the wife was driving, was not being operated by her in the interest of the community, since from the statement of facts it appears '* * * That at the time of the accident she (the wife) was acting within the scope of her employment (by Welcome Wagon Service Co.,) and had begun a mission in the interest of her said employer.'
>
> "Here we have held that the plaintiff cannot contend that the car was not being used on a community errand and we think that it would be stretching the very liberal

doctrine of the McHenry case beyond the breaking point to hold that the community might recover for loss caused by the negligence of a member of the community while engaged on a community mission."

In conclusion, I am therefore of the opinion that the exception should have been sustained and that on the merits the plaintiff should be denied recovery, having failed to bear the burden of proof, and in any event the wife's negligence was imputable to him, so as to bar his recovery.

I therefore respectfully dissent.

[File endorsement omitted.]

APPENDIX 3

COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

No. —

LOUIS WILBURN McDOWELL

vs.

NATIONAL SURETY COMPANY

Parish of East Baton Rouge.
On application for rehearing.
Rehearing Refused.
Ellis J. dissenting.
Baton Rouge, Louisiana, Dec. 8th, 1953.

(Sgd) M. A. LOTTINGER,
(Sgd) N. S. HOFFPAUIR,
Judges.

Filed Dec. 8th, 1953.

(Sgd) KARL LECHE,
Clerk.

(Seal)
A True Copy.

(Sgd) KARL LECHE,
Clerk.

APPENDIX 4

OPINION OF THE SUPREME COURT OF THE STATE OF LOUISIANA

—Filed February 15, 1954.

SUPREME COURT OF LOUISIANA, NEW ORLEANS

February 15, 1954.

By McCALEB, J.:

No. 41,644

LOUIS WILBURN McDOWELL

v.

NATIONAL SURETY COMPANY

In re: National Surety Corporation applying for certiorari or writ of review to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

Writ refused. The judgment is correct.

(S.) EHMcC
(S.) JBF
(S.) HAM
(S.) JCF
(S.) ALP

[File endorsement omitted]

APPENDIX 5

STATE OF LOUISIANA

Wade O. Martin, Jr.

I, the undersigned Secretary of State, of the State of Louisiana, do hereby certify that the annexed and following page contains a true and correct copy of Title 22 :983 of the Revised Statutes of 1950 of the State of Louisiana, as shown

by comparison with the original volumes on file in the archives of this office.

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this 19th day of April, A. D. 1954.

WADE O. MARTIN, JR.,
Secretary of State.

(Seal)

§ 983. Conditions of issuance of certificate of authority

A. After the requirements of R.S. 22:982 have been completed and before a certificate of authority is issued by the Secretary of State, a foreign or alien insurer shall satisfy the Secretary of State that:

(1) Its name is not the same as, or deceptively similar to the name of any other insurer already authorized to transact business in this state;

(2) It is possessed of at least the minimum capital and surplus requirements for similar domestic insurers authorized to transact like kinds of insurance which it is authorized to transact in the state of its domicile or entry, including, if a mutual or reciprocal insurer, writing non-assessable policies, the surplus requirement for a similar domestic mutual insurer to issue non-assessable policies;

(3) Its funds are invested in accordance with the laws of its domicile.

B. Before issuance of the certificate of authority to a foreign insurer, such insurer shall make a deposit as required by Part XXII and file a certificate from an official of another state showing that a deposit has there been made, in the same amount that is required of a similar domestic insurer transacting like kinds of insurance.

C. Before issuance of the certificate of authority to an alien insurer, such insurer shall make a deposit as required by Part XXII and must maintain within the United States assets in amount not less than its outstanding liabilities arising out of its insurance transactions in the United States, and which assets shall be in addition to the larger of the following sums:

(1) The largest amount of deposit required by this Code to be made in this state by any type of domestic insurer transacting like kinds of insurance; or

(2) Two hundred thousand dollars.

The trust deposit shall be for the security of all policyholders or policyholders and obligees of the insurer in the United States. It shall not be subject to diminution below the amount currently determined in accordance with this Sub-section so long as the insurer has outstanding any liabilities arising out of its business transacted in the United States.

The trust deposit shall be maintained with public depositories or trust institutions within the United States approved by the Secretary of State.

D. Before issuing a certificate of authority to a foreign or alien insurer, the Secretary of State may cause an examination to be made of its condition and affairs.

(Source: Acts 1948, No. 195, § 21.03.)

APPENDIX 5

STATE OF LOUISIANA

Wade O. Martin, Jr.

I, the undersigned, Secretary of State, of the State of Louisiana, do hereby certify that the annexed and following page contains a true and correct photostat copy of Title 22:655 of the Revised Statutes of 1950 of the State of Louisiana, as shown by comparison with the original volumes on file in the archives of this office.

Given under my signature, authenticated with the impress of my Seal of office, at the City of Baton Rouge, this, 19th day of April, A. D. 1954.

WADE O. MARTIN, JR.,
Secretary of State.

(Seal)

§ 655. Liability policy; insolvency or bankruptcy of insured; direct action against insurer.

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

Source: Acts 1948, No. 195, § 14.45.)

APR 24 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 716

NATIONAL SURETY CORPORATION,
Appellant,

vs.

LOUIS WILBURN McDOWELL

APPEAL FROM THE COURT OF APPEAL FOR THE FIRST CIRCUIT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JACK P. F. GREMILLION,
Counsel for Appellee.

F. LOUIS GONZALES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 716

NATIONAL SURETY CORPORATION,
Appellant,

vs.

LOUIS WILBURN McDOWELL

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellee in the above entitled cause for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:—

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that Section 655 and 983, Title 22 of Louisiana Revised Statutes of 1950, as amended, authorizing a direct action by the injured party against the liability insurer in a contract entered into in Louisiana between a citizen of Louisiana, and an insurer authorized to do and doing business in Louisiana, delivered in Louisiana, impairs the obligation of the contract of liability insurance in violation of Article I, Section 10, and Section 1 of the Fourteenth Amendment of the Constitution of the United

States; and the sufficiency of the concurrent findings of the evidence as found by the three state courts. These claims the appellee denies and the Court of Appeal, First Circuit, of the State of Louisiana, and the Supreme Court of Louisiana, in the opinion and judgment here challenged determined the questions so raised by appellant adversely to it. The Court of Appeal of the State of Louisiana, as reported in *68 So. 2d 189, 193,* found:—

> "The said statute has been held constitutional. *Churchman vs. Ingram, La. App. 56 So. 2nd 297, 307.* Furthermore, the defendant, being an insurer doing business in the State of Louisiana, has consented to be sued in Louisiana directly by an injured party. The policy itself provides:
>
> '23. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the State wherein this policy issued are hereby amended to conform to such statutes.' "

At page 194, the Court said:

> "Therefore, we are of the opinion that Mrs. McDowell was negligent and that her negligence was the proximate cause of her husband's injury. We are not of the opinion that this is one of the exceptional type of cases that would relieve Mrs. McDowell of negligence. Furthermore, even were we to consider that Mrs. McDowell's negligence was not the sole cause of the accident, but was merely a contributing cause, the petitioner would still have his right of action, as the courts have held that when a defendant is responsible for one, two or more proximate causes of an injury, he cannot escape liability because a third person is responsible for a concurrent proximate cause."

In refusing writs of certiorari and review the Supreme Court of Louisiana said:

> "Writ refused. The judgment is correct." (Appendix 4)

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The cases relied upon by appellant do not, and cannot, infringe upon the States' right to regulate the business of insurance. (15 U.S.C. Sec. 1012); McCarran Act)

The Supreme Court of Louisiana has declared that the Louisiana direct action statute vests in an injured party an immediate right of direct action against the insurer of the party responsible for the injuries, and that has been held to be an expression of the public policy of the State of Louisiana. (*Davies* v. *Consolidated Underwriters, 6 So. 2d 351, 357).*

An identical attack on a similar statute was disposed of by this Honorable Court adversely to appellant's contention, in *Merchants Mutual Automobile Liability Ins. Co.* v. *Smart, 267 U. S. 126, 129-130,* where this Court said:

> ". . . it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured."

And again in the same case:

> "Whatever the special occasion for the enactment, it is clear that the exercise of the police power in passing it was reasonable and cannot be said to deprive the insurance company of property without due process of law. It is remembered that the assumption of liability by the insurance company under Sec. 109 is entirely voluntary. It need not engage in such insurance if it chooses not to do so."

In *Calif. State Automobile Association Insurance Bureau* v. *John R. Maloney, Insurance Comm. of State of Cali-*

fornia, 341 U. S. 105, this Court, citing Merchants Mutual case, supra, with approval, said:

> "A state has broad powers over the insurance business. In no case has the Supreme Court invalidated, as violative of due process on the ground of unreasonableness, a regulation which by its nature was applicable to domestic as well as to foreign corporations."

The appeal presents only a question of pleading and practice in the Courts of the State of Louisiana. The Supreme Court of the State, in *Home Ins. Co.* v. *Highway Ins. Underwriters, 62 So. 2nd 828, 831 (1952)* said:—

> "The Legislature evidently felt that our courts should not be made to become circumlocution officers winding and unwinding red tape, but felt that the nearest point to a given object was a straight line—it enacted the provision of a direct action and with due care gave an interpretation of the provisions of Act 55 of 1930, as amended, when it expressed its intent as to the limitation of the scope of operation on the remedial act."

On page 830 of the same Home Ins. Co. case, *supra*, the Court said:—

> "It is and was of no substantial importance to an insurer that a suit must first be brought against its principal. It has and had no vested interest in the right to be sued only by its principal. Its obligation to pay in the event of damage caused by its principal cannot be said to be impaired by the fact that payment may be demanded directly by the injured party, instead of indirectly through the insured."

As a question of pleading and practice, the decision of the highest court of the State is final, and the Supreme Court will not review the judgment of a state court. *(Texas & N. O. R. Co.* v. *Miller, 221 U. S. 408; Kammerer* v. *Kroeger, 299 U. S. 302).*

It is respectfully submitted that the contract of insurance having been entered into in Louisiana, between a Louisiana citizen and an insurance corporation authorized to do business and doing business in Louisiana, who has consented to be sued directly by the injured party, which stipulation is made a part of the policy by reference to the state statute, the rights of the parties and the procedure to be followed in the State Courts of Louisiana are controlled by the law of the State of Louisiana, and is clearly a regulation within the police power of the State.

We further submit that the question presented in this appeal has long ago been so definitely determined that no substantial question is presented by this appeal entitling appellant to invoke the jurisdiction of the Supreme Court of the United States. *Merchants Mutual Automobile Liab. Ins. Co.* v. *Smart*, 267 U. S. 167; *Maryland Cas. Co. et al.* v. *Gertrude Picard Cushing, et al.*, 347 U. S. ——.

The question of the sufficiency of the evidence, contrary to the concurrent findings of the three state courts, is so wanting in substance that the motion to affirm should be granted. (*Chicago R. I. & P. Ry. Co.* v. *Devine, 239 U. S. 52, 60 L. Ed. 140*)

WHEREFORE, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Court of Appeal, First Circuit, for the State of Louisiana, be affirmed.

Respectfully submitted,

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F. LOUIS GONZALES,
Of Counsel.

No. 716. NATIONAL SURETY CORP. *v.* MCDOWELL. Appeal from the Court of Appeal of Louisiana, First Circuit. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Ralph M. Kelton* for appellant. *Jack P. F. Gremillion* for appellee. Reported below: 68 So. 2d 189.